No. 16531

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REX BATY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On August 13, 1958, the Federal Grand Jury in and for the Southern District of California indicted the appellant in six counts for unlawfully and fraudulently causing to be transported in interstate commerce falsely made and forged checks knowing checks to be falsely made and forged in violation of Title 18 U. S. C., Section 2314 [Clk. Tr. 2-4].[1]

Upon arraignment and a plea of not guilty appellant was tried by jury and convicted of Counts One, Two Three, and Four of the indictment on October 20, 1958 [Clk. Tr. 17] [T. R. 424].[2]

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[1]Clk. Tr. refers to the Clerk's Transcript of Record.

[2]T. R. refers to the Transcript of Record, of the Court Reporter.

The sentence was imposed by the Court on November 10, 1958, under which the appellant was committed to the custody of the Attorney General for a periof of 18 months on Count One, 18 months on Count Two, and 18 months on Count Three, said sentence to run consecutively. The imposition of sentence was suspended on Count Four and appellant placed on probation for a period of 5 years, which period is to commence after release from custody [Clk. Tr. 18] [T. R. 430].

The jurisdiction of the District Court is predicated upon Title 18, U. S. C., Section 3231, and Title 18, U. S. C., Section 2314. Jurisdiction of this Court rests pursuant to Title 28, U. S. C., Sections 1291 and 1294.

II.

STATUTES INVOLVED.

The indictment in this case was brought under Title 18, U. S. C., Section 2314, which provides in pertinent part as follows:

> "Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce, any falsely made, forged, . . . securities, knowing the same to have been falsely made, forged. . . .
>
> "Shall be fined not more than $10,000 or imprisoned not more than 10 years or both."

Also pertinent is Title 18, U. S. C., Section 2(b) which provides as follows:

> "Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

III.
STATEMENT OF THE CASE.

Appellant was indicted on August 13, 1958, upon which he was arraigned and pleaded not guilty. After a motion to dismiss the indictment [Clk. Tr. 5], appellant was tried by jury.

A motion for acquittal was made on behalf of defendant at the end of the Government's case in chief [T. R. 213-216] and renewed after all the evidence had been submitted [T. R. 359]. The court denied both motions [T. R. 216, 359].

The jury, having found appellant guilty on Counts One, Two, Three, and Four, sentence was imposed by the Court on November 10, 1958.

Notice of appeal was filed by the appellant on November 13, 1958 [T. R. 21-22].

Appellant, in his brief, argues the following points:

1. The Court erred in denying the motion of appellant to dismiss the indictment and in denying the motions for a judgment of acquittal on the basis that interstate transportation was not shown.

2. The Court erred on instructions to the jury as to transportation.

3. The Court should have permitted an inspection of a report pursuant to Section 3500, Title 18, U. S. C.

IV.

STATEMENT OF THE FACTS.

Appellant resided at 51 West Arbor Street, Long Beach, California, with Mr. L. S. Sherwood, an elderly gentleman, Mrs. Alice Saling, and Mrs. Bonnie Brummer [T. R. 88, 224]. Mr. L. S. Sherwood maintained a checking account at the Farmers Bank of Emden, Emden, Missouri, and drew checks thereon, although residing in Long Beach, California [T. R. 156-157].

Approximately in May, 1958, appellant began cashing checks payable to himself bearing the signature "L. S. Sherwood" drawn on the Farmers Bank of Emden, Emden, Missouri, at Yarbrough's Market, 5318 Long Beach Boulevard, Long Beach, California, [T. R. 124-128, 207-208]. Six of these checks were not signed by Mr. L. S. Sherwood [T. R. 89, 120, 121], and upon an examination by a handwriting expert, the checks were found to be simulated forgeries of L. S. Sherwood's authentic signatures [T. R. 166, 182]. The expert further testified that the appellant was not eliminated as a possible writer of these forged signatures [T. R. 173, 181], although the actual forger could not be identified [T. R. 182-183].

No authorization had been given by Mr. Sherwood to appellant or to anyone else to sign his name on these checks [T. R. 94].

Appellant denied forging the sugnature "L. S. Sherwood" on any of the checks [T. R. 226-230] contending that he had received the forged checks from Mrs. Alice

Saling with the signature "L. S. Sherwood" already thereon [T. R. 235]. The latter assertion was negated by Mrs. Saling [T. R. 329].

In a conversation with Federal Bureau of Investigation Agent Isadore Mann, the appellant initially denied any knowledge of the checks in question. Subsequently, however, he admitted that he had forged the signature "L. S. Sherwood" on four of the checks. [T. R. 186, 193, 194, 317]. Additionally, appellant offered to make restitution on these checks [T. R. 320]. Federal Bureau of Investigation Agent Richard Nelson, who was present at the conversation, corroborated this testimony [T. R. 337-340]. Naturally, appellant completely denied the making of these admissions or offers of restitution [T. R. 294-296].

After the forged checks were presented for payment at the local banks in Long Beach, California, they eventually were forwarded to the Farmers Bank of Emden, Emden, Missouri [T. R. 151-154] where they were honored by the Farmers Bank of Emden [T. R. 155-156, 159].

V.
ARGUMENT.

A. The Trial Court Did Not Err in Denying Appellant's Motion to Dismiss Indictment or in Denying the Motions for Acquittal.

1. The Legislative Intent Was to Correlate Title 18, U. S. C., Section 2314 With Title 18, U. S. C., Section 2.

Appellant's contention apparently is that Title 18, U. S. C., Section 2314, does not prohibit the causing of forged securities to be transported in interstate commerce with the requisite intent.

As enacted in 1940 as Title 18, U. S. C., Section 415[3], the word "transport" was in each case followed by the words "or cause to be transported." However, on June 25, 1948, the effective date of the present section, Title 18, U. S. C., Section 2314, the words "or cause to be transported" were deleted. A perusal of the pertinent reviser's note would indicate that;

> "Reference to persons causing or procuring was ommitted as unnecessary in view of the definition of 'Principal' in Section 2 of this Title."
>
> Reviser's Note, Title 18, U. S. C., Section 2314.

Coincidentally, on the same date of the deletion and enactment of Title 18, U. S. C., Section 2314, Title 18, U. S. C., Section 2 was amended to add 2(b) which, upon amendment in 1951, now reads as follows:

> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would

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[3]Title 18, U. S. C. 1940 ed. Section 415 (May 22, 1934, Chapter 333, Section 3, 48 Stat. 794; Aug. 3, 1939, Chapter 413, Section 1, 53 Stat. 1178).

be an offense against the United States is punishable as a principal."

The reviser's note to this section comments that:

"Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as 'causes or procures.'"

Continuing, the note relates:

"The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who 'aids, abets, counsels, commands, induces, or procures' another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States." Reviser's Note, Title 18, U. S. C., Section 2. Based on Title 18, U. S. C. 1940 Ed. Section 550, March 4, 1909, Chapter 321, Section 332, 35 Stat. 1152 [Derived from R. S. Sections 5323, 5427].

See:

Pereira v. United States, 202 F. 2d 830, 836 (5th Cir. 1953) affirmed 347 U. S. 1 (1954).

As it can readily been seen, there was no intention whatsoever to narrow the effect of Title 18, U. S. C., 2314, but rather to make the section more concise.

The Supreme Court of the United States has expressly stated that:

". . . to constitute a violation of these provisions, it is not necessary to show that petitioner actually mailed or transported anything themselves, it is sufficient if they caused it to be done."

Pereira v. United States, 347 U. S. 1, 8 (1954).

And further:

> "When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso Bank for collection he 'caused' it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines." (347 U. S. 1, 9 (1954) citing *United States v. Sheridan,* 329 U. S. 379 (1946) which appellant calls no longer authoritative.)

Similarly, the United States Court of Appeals for the Ninth Circuit, in a factual situation closely related to the case at bar, ruled that there would be a violation of Title 18, U. S. C., Section 2314, where one knowingly cashed a forged check on an out-of-state bank.

> *United States v. Bremer,* 207 F. 2d 247 (9th Cir., 1953).

In a Second Circuit case, the Court found *United States v. Sheridan, supra,* controlling and overruled their prior decision of *United States v. Paglia,* 190 F. 2d 445 (2d Cir., 1951).

> *United States v. Taylor,* 217 F. 2d 397 (2nd Cir., 1954).

Numerous other cases are in accord and it can be considered well settled that Title 18, U. S. C., 2314 prohibits a person knowingly cashing in one state a forged check drawn upon a bank in another state.

> *United States v. Sheridan,* 329 U. S. 379 (1946);
>
> *Pereira v. United States,* 202 F. 2d 830 (5th Cir., 1953) affirmed 347 U. S. 1 (1954);

Davis v. United States, 237 F. 2d 794 (9th Cir., 1956) *cert. den.* 352 U. S. 961 (1957);

United States v. Bremer, 207 F. 2d 247 (9th Cir., 1953);

United States v. Taylor, 217 F. 2d 397 (2nd Cir., 1954);

Walker v. United States, 154 Fed. Supp. 648 (D. C. N. J. 1957), affirmed 251 F. 2d 616 (3rd Cir., 1958), *cert. den.* 357 U. S. 921 (1958);

Hubsch v. United States, 256 F. 2d 820 (5th Cir., 1958);

Rickey v. United States, 242 F. 2d 583 (5th Cir., 1957);

Roddy v. United States, 262 F. 2d 308 (7th Cir., 1958), *cert. den.* 359 U. S. 949 (1959).

With almost complete unanimity the various jurisdictions have held that it was a violation of Title 18, U. S. C., Section 2314 to cause forged securities to be transported in interstate commerce with the requisite knowledge and intent. To proffer a contrary position against this mountain of authority is bold indeed; especially, when the apparent totality of the position is based upon a case which has been overruled in its own jurisdiction on precisely this point.

2. There Is Substantial Evidence to Support the Verdict of the Trial Court.

Although the appellant has not directly specified as error the sufficiency of evidence to support the verdict of the trial court, the point has been brought to the attention of the court.

At the outset the appellant is faced with the proposition that the Court of Appeals cannot substitute its judg-

ment for the trial court in finding disputed facts, and a verdict supported by substantial evidence is binding on the reviewing court.

Glasser v. United States, 315 U. S. 60, 80 (1941);

Sandez v. United States, 239 F. 2d 239 (9th Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), *cert. den.* 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), *cert. den.* 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952).

It is apparent from the record of the proceedings that there is substantial evidence to support the verdict. The checks in question were not signed by Mr. L. S. Sherwood, the true maker-owner of the checking account [T. R. 89, 120, 121], nor had he given authority to appellant or anyone else to sign his name to the checks [T. R. 94]. An analysis of the checks by a handwriting expert revealed the signature to be simulated forgeries [R. T. 166, 182]. These forged checks were drawn on the Farmers Bank of Emden, Emden, Missouri, where they were forwarded and honored [T. R. 155-156, 159] after the appellant had cashed the checks at a local market in Long Beach, California [T. R. 124-128, 207-208]. The possibility of a forgery was brought to the attention of the appellant by Johnny Yarbrough, the market owner [T. R. 137] and appellant also testified that he thought the procedure by which he was given the checks was unusual [T. R. 239, 266-267]. Furthermore, the appellant admitted to the Agents of the Federal Bureau of Investigation that he had forged the signatures on four of the

checks in question [T. R. 186, 193, 194, 317, 337-340] and had offered to make restitution thereon [T. R. 320].

The effect of the evidence is conclusive that the appellant caused to be transported in interstate commission forged checks with knowledge that they were forged. Such evidence as was produced is more than substantial to support the verdict rendered in the trial court.

B. The Trial Court Did Not Commit Error on Its Instruction to the Jury on the Question of Transportation of Forged Securities in Interstate Commerce.

The exact language of a requested instruction need not be adopted, but it is enough that they are or have already been given in substance.

Sugarman v. United States, 249 U. S. 182, 185 (1919);

Shibley v. United States, 237 F. 2d 327 (9th Cir., 1956), *cert. den.* 352 U. S. 873 (1956), rehearing den. 352 U. S. 919 (1956);

Herzog v. United States, 226 F. 2d 561 (9th Cir., 1955), *cert. den.* 352 U. S. 844 (1956).

A very careful reading of the transcript of the proceedings would reveal that the trial court in the instant case went even further and gave the entire text of appellant's Instruction Number Two. On page 416 of the Transcript of the Record the following was recorded:

> "Mr. Norris: . . . defendant does object to the court's ruling excluding—rejecting the defendant's requested Instruction No. 2 on the ground that—(whereupon the following proceedings were had in the presence and hearing of the jury:)

"THE COURT: You are instructed that you cannot return a verdict of guilty on any count unless you find beyond any reasonable doubt that the defendant willfully cashed the check described in that count to be transported in interstate commerce. Willfully causing the check to be so transported means that the act of transporting the check in interstate commerce was an act that the defendant wished to bring about, that he sought by his action to make it succeed. Or that in the normal course of events, which would be within the contemplation of the defendant, the transportation in interstate commerce would be a necessary adjunct."

A summary disposition may be made of the appellant's contention that the trial court's instruction that "appellant was guilty if he 'caused' the transportation" was incorrect. It need only be reiterated that since the present status of the law is as propounded by the Court in its instructions to the jury, there is no valid basis for the appellant's contention.

See:

Pereira v. United States, supra (and discussion under subheading A of this Argument).

C. Ruling Upon Motion to Inspect Report Pursuant to Title 18, U. S. C., 3500 Was Properly Not Made by the Trial Court.

A contention not urged in the District Court cannot be urged for the first time on appeal.

Crutchfield v. United States, 142 F. 2d 170 (9th Cir., 1943);

Trice v. United States, 211 F. 2d 513 (9th Cir., 1954), *cert. den.* 348 U. S. 900 (1954);

Davis v. United States, 237 F. 2d 794 (9th Cir., 1956), *cert. den.* 352 U. S. 961 (1956);

Zacher v. United States, 227 F. 2d 219 (8th Cir., 1955), *cert. den.* 350 U. S. 993 (1956).

In the instant case, although the Motion for Written Reports had initially been presented to the trial court [T. R. 205] before any ruling could be made thereon by the court, the motion was withdrawn by the appellant [T. R. 213]. Therefore, the point not having been urged in the trial court, it is obviously out of order before this Court.

However, assuming the motion was properly before this Court for consideration, the contention is yet without merit.

The latest interpretation of Title 18, U. S. C., Section 3500 was made recently by the Supreme Court of the United States in *Palermo v. United States,* Supreme Court of United States No. 471-October Term, 1958, Decided June 22, 1959. After ruling that Title 18, U. S. C., Section 3500 exclusively determined the procedure in the production of statements of a Government witness made to an agent of the Government, the court further affirmed the trial court and the Court of Appeals in holding that the summary made by the Internal Revenue Service Agent was not a "statement" within the meaning of paragraph (e) of this Section.

The Court stated:

> "The act's major concern is with limiting and regulating defense access to Government papers, and it is designed to deny such access to these statements which do not satisfy the requirement of (e), or do not relate to the subject matter of the witness' testi-

mony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them."

The contention that the report should be produced because "the report might have shown that the appellant did not admit signing the name 'L. S. Sherwood' to the check," would seem to indicate that the appellant only wanted to see the report to determine if there was a "statement" indicating a lack of an admission. Seemingly, the appellant is attempting to do precisely what the Court states ought not to be allowed.

VI.
CONCLUSION.

1. The motion to dismiss the indictment and motions for acquittal were properly denied.

2. The instructions given to the jury were proper.

3. The report need not have been produced pursuant to Title 18, U. S. C., Section 3500.

Respectfully submitted,

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